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Thirty-ninth session

Summary record of the 822nd meeting
Held at Headquarters, New York, on Monday, 26 June 2006, at 3 p.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... Mexico

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Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*)

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06-40847 (E)

The meeting was called to order at 3.10 p.m.

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*) (A/CN.9/589, 592, 605, 606, 607, 609 and Add.1-6)

Draft legislative provisions on interim measures and preliminary orders (*continued*)

Chapter VI bis. Interim measures and preliminary orders (*continued*)

Section 2. Preliminary orders (*continued*)

Article 17 quater. Specific regime for preliminary orders (*continued*)

1. **The Chairman** invited the Commission to resume discussion of article 17 quater, paragraph (4), of the draft legislative provisions on interim measures and preliminary orders contained in the note by the Secretariat on the settlement of commercial disputes: interim measures (A/CN.9/605). If he heard no objection, he would take it that the Commission wished to adopt draft article 17 quater, paragraph (4).

2. *It was so decided.*

3. **The Chairman** invited the Commission to resume its discussion of draft article 17 quater, paragraph (5).

4. **Mr. Sorieul** (International Trade Law Division) said that further clarification was needed on the proposal made by the Working Group and reflected in document A/CN.9/605, paragraph 16, to add the following text to paragraph (5) of article 17 quater: "a party shall not be prevented from seeking any relief in a court because it has obtained such a preliminary order from the arbitral tribunal". The text did not necessarily have to be incorporated in the article itself; rather, it might be included in accompanying explanatory material.

5. **Mr. Schneider** (Observer for the Swiss Arbitration Association) expressed reservations about stating the concept as a general principle, which would suggest that a party was free without restriction to resort to State courts for interim measures. A proviso should be added to the effect that, once an arbitral tribunal had been established, recourse to the tribunal should be given priority unless there were serious reasons not to do so. In accordance with the International Chamber of Commerce (ICC) rules of arbitration, after the appointment of a tribunal, recourse to State courts should be an exceptional measure. Therefore, the text should not be included in explanatory notes.

6. **Mr. Castello** (United States of America), referring to the statement by the observer for the Swiss Arbitration Association, said his delegation did not consider that there was a presumption or that the Working Group had favoured creating the presumption that, once a tribunal had been created under the Arbitration Model Law, there should then be a preference for seeking interim measures from the tribunal. While there was such a preference under ICC rules, his delegation's view was supported by a footnote to paragraph 16 of document A/CN.9/605 relating to paragraph 27 of the report of the Working Group on Arbitration and Conciliation on the work of its forty-fourth session (New York, 23-27 January 2006) (A/CN.9/592), which suggested that article 9 of the Arbitration Model Law already protected the right of a party to arbitral proceedings to request from a court an interim measure. His delegation understood that that remained a general principle under the Model Law.

7. It was unclear why the Working Group had not adopted the proposed text. It might be that there had been some concern about violating the res judicata principle. The explanation put forward by the observer for the Swiss Arbitration Association, however, would not be a basis for rejecting the proposal.

8. **The Chairman** said that, under article 9 of the Model Law on International Commercial Arbitration, it was not incompatible with an arbitration agreement for a party to request from a court an interim measure of protection and for a court to grant such a measure. When the Working Group had considered that point, it had decided that there was no need to make another change to the Model Law. As the proposal under discussion would modify article 9 of the Model Law, it had not been approved.

9. **Ms. Kirby** (Observer for the International Chamber of Commerce) said that her delegation associated itself with the statement by the representative of the United States of America. She saw no harm in

including the explanation given in paragraph 16 of document A/CN.9/605. If the explanation met the concerns raised by the observer of the Swiss Arbitration Association, she would suggest that the wording could be revised to read as follows: "A party shall not be prevented from seeking any relief it would otherwise be entitled to seek in a court merely because it has obtained such a preliminary order from the arbitral tribunal."

10. **Mr. Dervaird** (United Kingdom) said that he generally agreed with the comments made by the observer for the International Chamber of Commerce (ICC). He wished to emphasize, however, the importance of including a phrase such as was proposed in paragraph 16 of document A/CN.9/605 because, under article 17 quater, paragraph (5), a preliminary order was not subject to enforcement by a court. There might be a situation in which, in the absence of enforcement by a court, the person who had obtained the order was concerned that the unenforceable order would not be obeyed and that court assistance would be required. The inclusion of the explanation in paragraph 16 would be of assistance for that purpose.

11. **The Chairman** proposed that the wording suggested by the observer for ICC should be part of the explanatory material of the text.

12. **Mr. Slate II** (Observer for the American Arbitration Association) said that his delegation did not have any objection to the substance of the suggestion. The use of the word "merely", however, might tend to denigrate the role of the arbitral tribunal.

13. **The Chairman** said that the Secretariat would select the appropriate wording for the proposed explanatory material, taking into account the comments made. If he heard no objection, he would take it that the Commission wished to adopt article 17 quater, paragraph (5), of the draft legislative provisions on interim measures and preliminary orders contained in document A/CN.9/605 with a revised explanatory note as proposed by the observers for ICC and the American Arbitration Association.

14. *It was so decided.*

Article 17 quinquies. Modification, suspension, termination

15. **The Chairman** said that, if he heard no objection, he would take it that the Commission wished to adopt article 17 quinquies of the draft legislative provisions on interim measures and preliminary orders contained in document A/CN.9/605.

16. *It was so decided.*

Article 17 sexies. Provision of security

17. **The Chairman** invited the Commission to discuss draft article 17 sexies.

18. **Mr. Castello** (United States of America) said the Working Group had recognized that there were many variables that might arise between the point at which the tribunal made a decision on whether to grant a preliminary order and the point at which a party requesting the order might be able to assemble the necessary security ordered by the tribunal. The phrase "in connection with", in article 17 sexies, paragraphs (1) and (2), had been chosen intentionally to give the tribunal some flexibility. It might decide that, even though it might take days for the requesting party to assemble a letter of credit, an order should be granted immediately in the light of the urgency of a threat and the expectation that the party could and would assemble the necessary security. Imposing a blanket requirement that the security and the order should go in lock step did not allow for such flexibility. Therefore, his delegation would not favour any alteration in that regime.

19. **Mr. Rodríguez** (Observer for the Latin American Federation of Banks) asked, in connection with the possible requirement by the arbitral tribunal that the party requesting an interim measure should provide appropriate security in connection with the measure, whether the party might also request counter-security from the tribunal.

20. **The Chairman** said that all the articles established the requirements and conditions to be met for the issuance of an interim measure. That did not mean that the party affected by such a measure could not request the arbitral tribunal to waive the security. The Working Group had concluded that there was no need to state that explicitly.

21. **Mr. Sharif** (Qatar) said that there was a need to harmonize the wording in the two paragraphs of article 17 sexies. Paragraph (1) read, "The arbitral tribunal may require ...", whereas paragraph (2) read, "The arbitral tribunal shall require ...". The second paragraph could be deleted entirely or merged with the first paragraph, so that it would read as follows: "The arbitral tribunal may require the party requesting an

interim measure to provide appropriate security in connection with the measure unless the arbitral tribunal considers it inappropriate or unnecessary to do so." That would eliminate unnecessary repetition.

22. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that his delegation could approve the proposal to keep only paragraph 1. The Working Group had discussed the matter extensively, however, and had concluded that those who had reservations about preliminary orders required such a stringent provision. Therefore, his delegation continued to support the compromise, despite provisions with which it was not pleased.

23. **The Chairman** said that paragraph (1) used the word "may" because cases involving inter partes interim measures gave arbitral tribunals discretion as to whether security was required. As the second paragraph referred to ex parte preliminary orders, which entailed an obligation, the word "shall" was used. In the case of preliminary orders, the arbitrary tribunal must require the party to provide security unless the tribunal considered such a guarantee inappropriate or unnecessary.

24. If he heard no objection, he would take it that the Commission wished to adopt article 17 sexies of the draft legislative provisions on interim measures and preliminary orders contained in document A/CN.9/605.

25. *It was so decided.*

Article 17 septies. Disclosure

26. **The Chairman** invited the Commission to discuss draft article 17 septies.

27. **Mr. Graham Tapia** (Mexico) noted that the article had been inspired by article 18 of the Model Law on Cross-Border Insolvency, which established the obligation to disclose relevant information. While such an obligation was understandable in insolvency proceedings, the situation was quite different in the case of arbitral proceedings, which were adversarial in nature and in which the party wishing to present its case bore the burden of proof. There was no antecedent in arbitration procedures or commercial trials in which one party was responsible for disclosing evidence which would benefit the other party. The obligation of the party requesting an interim measure to disclose any material change in the circumstances on the basis of which the measure had been granted was contrary to that situation. In addition, there was no sanction for the party if it did not disclose the change in circumstances.

28. His delegation therefore proposed the deletion of paragraph (1) and of the second sentence of paragraph (2).

29. **Mr. Uzelac** (Croatia) said that his delegation was reluctant to accept the Mexican proposal. The text in article 17 septies had been drafted as a result of the process of separating the initial draft into several articles. There was a certain parallelism between all the articles in section 3, which dealt first with the standard for interim measures and then with the standard for preliminary orders. The original text should be retained.

30. **The Chairman** explained that the second paragraph of article 17 septies, which referred to preliminary orders, established the obligation of full and frank disclosure. Actually, that requirement might well have been included in article 17 quater, which dealt with the conditions for obtaining a preliminary order. The second paragraph of article 17 septies provided that the disclosure obligation of the requesting party would continue until the party against whom the order had been requested had had an opportunity to present its case. Once that happened, the disclosure obligation was transferred to the party against whom the order had been requested. What the Mexican delegation had objected to was the fact that the first paragraph required the party that had obtained the interim measure to do the work of the party against whom the measure was requested. The party against whom the measure had been requested would be aware of all the circumstances and at some point would discover that the circumstances giving rise to the request had changed. It was logical to assume that the party against whom the measure was requested would ask the arbitral tribunal to discontinue the measure in the light of the change in circumstances.

31. Paragraph (2) referred to ex parte preliminary orders. It began by providing that, when the party against whom an order had been requested had not had an opportunity to present its case, the requesting party had the obligation to inform it of any circumstances that might cause the party against whom the order had been requested to ask for the order to be refused. The second paragraph then went on to establish that the disclosure obligation remained until the affected party had had the opportunity to make its case. Thus, there was no parallelism in the articles in question.

32. **Ms. Kirby** (Observer for the International Chamber of Commerce) said that, during the Working Group's discussions on the disclosure principle embodied in article 17 septies, the divide between the civil-law and common-law systems had become apparent. The issue had been fully debated and resolved at that time. The party against whom a measure was directed would not necessarily know of changes in circumstances that were known to the party benefiting from the measure. It could happen, for example, that changes in the circumstances of the requesting party might make the measure moot, and that the opposing party might not be aware of those changes. It would not be fair to hypothesize that, in all circumstances, the party against whom the measure was directed would be in a position to raise the issue.

33. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that he was not sure whether the divide between common law and civil law had been bridged. The difference was a systemic one; there was also a feeling that it was not realistic to require the disclosure provision. Parties from the common-law world, where disclosure was an ingrained obligation which lawyers took very seriously, might even be at a disadvantage when faced with parties where such an obligation was not generally accepted. The Swiss delegation had proposed that the individual arbitral tribunal should decide on the matter. If the Commission decided to reopen the discussion, that proposal would be resubmitted.

34. **Mr. Rodríguez** (Observer for the Latin American Federation of Banks) endorsed the Mexican proposal. The first paragraph of the article placed the burden on the requesting party, and that was not acceptable. The arbitral tribunal should not be given the option to decide who should or should not provide evidence or information.

35. **Mr. Uzelac** (Croatia) said that he was not convinced that the issue was entirely one of common law versus civil law. Although there was no strong disclosure obligation in civil law, there were other principles that could have the same effect, such as the principle of fairness and cooperation in the process; in other words, the general principle was to act in good faith throughout the proceedings. Even when the other party had been given the opportunity to be heard, one should still assume that the party requesting the interim measures would have the obligation to disclose those facts that were either not known to the other party or would lead to a different decision by the arbitral tribunal. There could be situations in which certain material changes in circumstances were known only to the party that had requested the interim measures and in which, based on the assumption of cooperation, there should be a disclosure by that side. There could also be situations in which a party that had been given notice of interim measures had had the opportunity to be heard, but had not reacted. In such situations, especially where interim measures were concerned, it was important to be very cautious, and his delegation therefore felt that paragraph (1) in its present form should be maintained. The requesting party should not be relieved of the responsibility to disclose any material changes in circumstances simply because the other side had had a formal or material chance to be heard.

36. **Mr. Castello** (United States of America) said that his delegation was in favour of keeping the text that had been developed by the Working Group. It shared the doubt expressed as to whether the point that was the focus of paragraph (1) actually highlighted a divide between common-law and civil-law traditions. The paragraph referred to a situation in which a party requesting an interim measure had made a representation about a fact to the arbitral tribunal as a basis for obtaining the interim measure and had subsequently learned that the fact in question was not or was no longer true. The party that had considered it important enough to bring to the attention of the arbitrator ought to have the obligation to correct what had become a misstatement or a misapprehension of the facts. Perhaps in some legal traditions that was the obligation of the other party. However, that was not an unreasonable obligation to impose on counsel for one party. That was quite different from the focus of paragraph (2), which was that a counsel for one party had to put forward facts that were not in support of its position but nevertheless needed to do so because only one party was aware of them.

37. **The Chairman** said that a small group of delegations would work on a new wording of article 17 septies, paragraph (1), and submit it to the Commission.

Article 17 octies. Costs and damages

38. **The Chairman** said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 17 octies.

39. *It was so decided.*

Article 17 novies. Recognition and enforcement

Paragraph (1)

40. **Mr. Li** Wenzhu (China) said that the phrase "unless otherwise provided by the arbitral tribunal" should be deleted. It could lead to misunderstandings, since the arbitral tribunal itself would already have issued the measure.

41. **The Chairman** pointed out that, when the Working Group had discussed the matter, it had considered the possibility that the arbitral tribunal might grant an interim measure with the stipulation that the party concerned could not apply to the court. If he heard no objection, he would take it that the Commission wished to adopt draft article 17 novies, paragraph (1).

42. *It was so decided.*

Paragraph (2)

43. **The Chairman** said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 17 novies, paragraph (2).

44. *It was so decided.*

Paragraph (3)

45. **The Chairman** said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 17 novies, paragraph (3).

46. *It was so decided.*

47. *The meeting was suspended at 4.10 p.m. and resumed at 4.50 p.m.*

Article 17 decies. Grounds for refusing recognition or enforcement

Paragraph (1)

48. **Mr. Bellenger** (France) said that the wording was too complex, as it combined provisions based on article 36 of the Model Law on International Commercial Arbitration, which referred to arbitral awards, with provisions stemming more specifically from requirements concerning interim measures. The wording proposed by his delegation could be found in document A/CN.9/609/Add.5, footnote 2.

49. **The Chairman** pointed out that the alternative wording proposed by France had already been discussed by the Working Group.

50. **Mr. Uzelac** (Croatia) said that the French proposal addressed some of the remaining difficulties with the current proposal for article 17 decies. His delegation had previously voiced its concern regarding the present formulation; for one thing, the analogy with the recognition and enforcement of arbitral awards was not entirely appropriate. Although he understood the difficulty of reverting to the issue after it had already been discussed at length, he felt that the French proposal had merit and should be supported.

51. **Mr. Dervaird** (United Kingdom) sought clarification of the relationship, in the French proposal, between article 17 novies and article 17 decies, since paragraph (1) of the French text appeared to be similar to article 17 novies, paragraph (1), in document A/CN.9/605.

52. It was also unclear whether the grounds for refusing recognition/enforcement in article 17 decies, paragraphs (1) (a) (ii) and (iii), were to be removed or retained. If they were to be removed, his delegation would have strong reservations about changing the wording at the present time.

53. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that it was important to clarify the relationship between article 17 novies and decies before continuing the discussion of the French proposal.

54. **Mr. Komarov** (Russian Federation) said that his delegation shared the doubts expressed by the two previous speakers: discussion of the French wording would require reconsideration of the wording in article 17 novies. In general, his delegation was of the opinion that a new version of article 17 decies would not be justified, since the substance of that article was linked to other provisions of the draft.

55. **Mr. Uzelac** (Croatia) said that the French proposal clearly contained a compressed version of article 17 novies and a reworded version of article 17 decies. His delegation proposed that the original version of article 17 novies should be retained but that paragraph (2) of the French proposal should be used as a basis for the reformulation of article 17 decies. Specifically, the initial chapeau of article 17 decies paragraph (1) would read "Recognition or enforcement

of an interim measure may be refused only ...". That would be followed by paragraphs (2) (a) and (b) of the French proposal, starting at "if".

56. **Mr. Castello** (United States of America) said that, although it was easier to state each of the grounds for possible non-enforcement, the Working Group had decided on cross-references to paragraphs in article 36 because the grounds for non-enforcement of interim measures ought to be, to the extent possible, the same as the grounds for non-enforcement of final awards. The Working Group had recognized that there were distinct circumstances which applied only to interim measures; those had been covered, especially in paragraphs (1) (a) (ii) and (iii) of article 17 decies. The French proposal did not appear to take the distinct circumstances into account or to include the grounds contained in paragraphs (1) (a) (iii) and (iv) of article 36. Such omissions raised the concern that, in the effort to be more concise, the Commission might be introducing unintentional changes and distinctions. For that reason, his delegation was inclined to retain article 17 decies, as set forth in A/CN.9/605.

57. **Ms. Perales Viscasillas** (Spain) said that her delegation preferred to retain the text in its present form and recalled that the Commission had previously rejected a text similar to the one proposed by the French delegation because it had not reflected the degree of detail contained in document A/CN.9/605.

58. **Mr. Möller** (Observer for Finland) said that his delegation fully endorsed the statements by the representatives of the United States and Spain. It was of the opinion that the current text could not be improved and was therefore reluctant to reopen discussions on the subject.

59. **The Chairman** recalled that, although the Working Group had proposed a long text which reproduced the text of article 36, it had ultimately decided on a short text for article 17 novies and decies. It therefore seemed to him that the current objections had already been raised during the discussion on the aforementioned texts and that the Commission was repeating a previous debate.

60. **Mr. Graham Tapia** (Mexico) said that his delegation was in favour of retaining the text as it stood.

61. **Ms. Kirby** (Observer for the International Chamber of Commerce) said that her organization endorsed the comments made by the delegations of Spain, the United States and Mexico.

62. **The Chairman** said that the proposal put forward by the French delegation would not be retained and invited the Commission to resume its analysis of the text of article 17 decies.

63. **Mr. Schneider** (Observer for the Swiss Arbitration Association), supported by **Mr. Markus** (Switzerland), said, with respect to paragraph (1) of article 17 decies and the question of jurisdiction, that it would be useful to specify that, when examining jurisdiction at the level of enforcement of an interim measure, the applying judge should not make a full determination of jurisdiction but should be aware that the arbitral tribunal itself determined jurisdiction only on a prima facie basis. It was not necessary to change the wording of the clause itself but it would be helpful to flag the point in the explanatory notes to the text.

64. **The Chairman** said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 17 decies, paragraph (1) as set forth in document A/CN.9/605 and to include the comment by the observer for the Swiss Arbitration Association in the explanatory material.

65. *It was so decided.*

66. **The Chairman** said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 17 decies, paragraph (2), as set forth in document A/CN.9/605.

67. *It was so decided.*

Article 17 undecies. Court-ordered interim measures

68. **Mr. Graham Tapia** (Mexico) proposed a new version of article 17 undecies, which was more concise and included references to provisions contained in other articles on interim measures. The proposed version read as follows: "In accordance with article 17, paragraph (2), a competent court may issue interim measures in connection with arbitration proceedings which have a seat either within or outside its jurisdiction. For that purpose, the provisions contained in articles 17 bis, 17 quinquies, 17 sextius, 17 septius and 17 octies shall apply. The arbitral tribunal shall have exclusive powers to award costs and damages as provided in article 17 octies."

69. The explanatory material would contain the comment that the judicial tribunal would exercise its competence in accordance with its own rules and procedures insofar as those were relevant to the specific features of an international arbitration.

The meeting rose at 5.35 p.m.